

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
76161-s76G BY ED JANNEY

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the November 4, 1992, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit 76161-s76G by Ed Janney is denied.

NOTICE

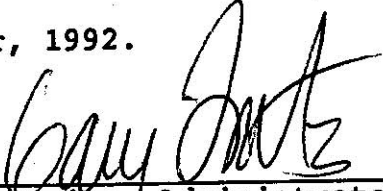
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for

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certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 4 day of December, 1992.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 7th day of December, 1992 as follows:

Ed Janney
110 N. Frontage Road
Deer Lodge, MT 59722

T.J. Reynolds and
Jim Beck
Helena Water Resources
Regional Office
1520 East 6th Avenue
Helena, MT 59620-2301

Robert Hollenback
151 Village Lane
Deer Lodge, MT 59722

John E. Stults
Hearing Examiner
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
76161-s76G BY ED JANNEY)	DECISION

* * * * *

Pursuant to Mont. Code Ann. §§ 85-2-121 and 85-2-309 (1991), a hearing was held in the above matter on July 25, 1991, in Deer Lodge, Montana, to determine whether a Permit to Appropriate Water based on the above application should be granted to Ed Janney under the criteria in Mont. Code Ann. § 85-2-311(1) (1989).¹

APPEARANCES

Applicant Ed Janney appeared at the hearing on his own behalf.

Objector Robert Hollenback appeared at the hearing on his own behalf.

Jim Beck, Agricultural Specialist in the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing as staff spokesman for the Department.

¹ Pursuant to the September 6, 1991, Notice, the decision in this matter was postponed until an administrative decision was issued on Application for Beneficial Water Use Permit 68033-s76G by Robert Hollenback. A Proposal for Decision on Application 68033-s76G was issued November 2, 1992.

the same source of water and the same parties as the present matter.

In the course of reaching a decision in this matter, the Hearing Examiner also took official notice of the Department's records of all water rights on the proposed source. Facts in this Proposal for Decision which have been derived from noticed materials are identified as such.

Immediately following the hearing, the Hearing Examiner conducted a site visit to the proposed point of diversion and place of use, and to Objector's property. Also present at the site visit were Applicant, Objector, and Jim Beck. The purpose of the site visit was to familiarize the Hearing Examiner with locations related to this application solely to facilitate his understanding. The offering of evidence or argument was not allowed, and did not occur.

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 76161-s76G was filed with the Department on September 24, 1990, at 4:00 p.m. (Department's file)

2. Applicant proposed on the application form to appropriate up to 3.41 acre-feet (AF) per year of water from an unnamed tributary of the Clark Fork River by means of a dam and reservoir in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 8 North, Range 9 West, Powell County, Montana, for stock watering and waterfowl purposes. The amount of water for stock water purposes would be limited to 1.01 AF per year; the amount for waterfowl would be

that is the natural gradient toward the Clark Fork River.

Surface flow in the source never reaches the Clark Fork River.

(Department's file, testimony of Ed Janney and Robert Hollenback)

6. Objector owns Permit to Appropriate Water 63377-s76G for 100 gallons per minute (gpm) up to 62 AF per year of water from the proposed source from April 1 through October 31 of each year. The priority date of this appropriation is August 15, 1986, which is earlier than the date of filing of the present application, September 24, 1990. Objector's water right would be senior in priority to any permit that might result from the present application. (Department's records and testimony of Robert Hollenback)

7. Objector's point of diversion is approximately one-quarter of a mile upstream from where the source enters Applicant's property and approximately two-thirds of a mile upstream from Applicant's proposed point of diversion. Consequently, Objector has physical access to any water in the source before it is available to Applicant. (Department's file, Hollenback file, and testimony of Robert Hollenback)

8. Applicant has a right to use the proposed source to water stock under an unrecorded water right which is exempt from filing requirements. The exempt right is for approximately 90 gpm, measured at the point the water enters Applicant's property, with a priority date of 1961 or 1962 for livestock drinking directly from the historic channel of flow in the roadside drainage ditch and natural channels. Historic use of the exempt

like to use as his place of use for watering stock. The proposed place of use for stock identified in the public notices is not the full extent of the area to which Applicant intends to expand the existing place of use. (Department's file and testimony of Ed Janney and Jim Beck)

13. Water in the proposed source flows onto Applicant's property at all times and in all years. The flow in the proposed source in the vicinity of Objector's point of diversion is approximately 140 gpm during most of the year. The flow at that point is stable throughout most of the year with some increased flows in the spring.

There is substantial loss of flow in the source due to seepage. Approximately 60 gpm (43 percent) seeps away in the one-quarter of a mile between Objector's point of diversion and Applicant's property boundary. Applicant testified there is significant seepage on his property due to gravelly soils. Water that moves across Applicant's property in the ditch flows to the general vicinity of the proposed reservoir site where the last of it soaks into the ground. If left in the natural channel, the water soaks into the ground approximately an eighth of mile up-gradient from the proposed reservoir site.

Due to the substantial seepage losses it is not possible to use flow information from upper portions of the stream channel to assume or project the amount of water that may actually occur at the proposed point of diversion. There is no evidence in the record establishing the amount of water in the source at the

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

5. To meet the substantial credible evidence standard in Mont. Code Ann. § 85-2-311(1) (1989) the applicant must submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the Department, the U.S. Geological Survey, or the U.S. Soil Conservation Service and other specific field studies, demonstrating that the criteria are met. Mont. Code Ann. § 85-2-311(4) (1989).

6. The proposed stock water use is not a new appropriation of water; rather, it is a change in an existing appropriation water right. See Finding of Fact 8, 10, 11, and 12. Therefore the amount of the proposed appropriation identified as a new appropriation for stock watering cannot be granted and must be subtracted from the proposed appropriation. See Mont. Code Ann. § 85-2-306(3) and (4) (1991); see also Mont. Code Ann. § 85-2-311(1)(d) (1989). Thus, the proposal is to appropriate a total of 2.4 AF for waterfowl. See Finding of Fact 2.

7. An exempt surface water right only entitles its owner to an instream use, hence Applicant's exempt water right for stock watering does not authorize use of Applicant's diversion ditch

burden on the source beyond that identified in the notification of the application as originally proposed, that would cause prejudice. See In re Application 50272-g42M by Joseph F. Crisafulli.

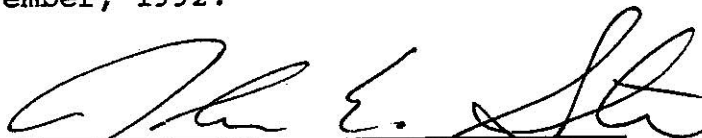
9. The suggestion of increased burden is inherent in the changes desired by the Applicant in this matter, i.e., expansion of the place of use and conveyance of the water away from the natural channel, and hence raise questions of potential impact on other appropriators. See Findings of Fact 9, 10, and 11. These elements of Applicant's proposed change were not identified in the public notice of the application. See Findings of Fact 2, 3, and 12. The lack of complete notice means that persons potentially affected by the change were given insufficient information to determine the likelihood of whether they would be adversely affected. Therefore, the change in existing water right contemplated by Applicant cannot be considered within the context of and proceedings on this application. See In re Application 24591-g41H by Kenyon-Noble Ready Mix Co.; In re Application 5569-41J by Walter L. Johnston; In re Application 14965-g41E and 19230-c41E by Thomas H. Boone, Trustee.

10. Applicant failed to prove that unappropriated water in the amount Applicant seeks to appropriate is available at the proposed point of diversion during the proposed period of appropriation. See Findings of Fact 2, 5, 7, and 13. There being nothing in the record that shows unappropriated water is available in the source at the proposed point of diversion during the

be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 4th day of November, 1992.



John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 4th day of November, 1992, as follows:

Ed Janney
110 N. Frontage Road
Deer Lodge, MT 59722

Robert Hollenback
151 Village Lane
Deer Lodge, MT 59722

T.J. Reynolds and
Jim Beck
Helena Water Resources
Regional Office
1520 East 6th Avenue
Helena, MT 59620-2301



Cindy G. Campbell
Hearings Unit Legal Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 76161-s76G BY ED JANNEY)

NOTICE

* * * * *

In the course of reviewing the water right records of the Department of Natural Resources and Conservation (Department) to reach a decision in the above-entitled matter, the Hearing Examiner discovered Application for Beneficial Water Use Permit No. 68033-s76G filed by Robert Hollenback on May 13, 1988.¹ Application No. 68033-s76G proposes to appropriate water, from the same source as is proposed for appropriation in the above-entitled Application, in the amount of 150 gallons per minute up to 55 acre-feet per year for irrigation purposes, which is a consumptive use. The proposed point of diversion in Application No. 68033-s76G is in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, Township 8 North, Range 9 West, Powell County, Montana, which is upstream of the proposed point of diversion in the above-entitled Application. If a permit were issued based on Application No. 68033-s76G, it would be senior in priority to any permit that might be issued based on the above-entitled Application.

No determination has been made by the Department as to

¹ This should not be confused with Application for Beneficial Water Use Permit No. 63377-s76G filed by Robert Hollenback on August 15, 1986, and granted by the Department in the Findings, Conclusions, and Order on Remand issued May 13, 1990.

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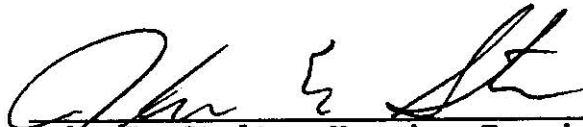
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whether a permit will be issued based on Application No. 68033-s76G. Thus, it is not possible for the Hearing Examiner to determine what amount of water in the source has been appropriated and, hence, whether unappropriated water is available in the proposed source sufficient to the appropriation proposed in the above-entitled Application.

For this reason, and pursuant to ARM 36.12.203(2)(q),

NOTICE is hereby given that the Proposal for Decision in the above-entitled matter will not be made until Application for Beneficial Water Use Permit No. 68033-s76G has been disposed through administrative action by the Department or withdrawal by the Applicant.

Dated this 6th day of September, 1991.


John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

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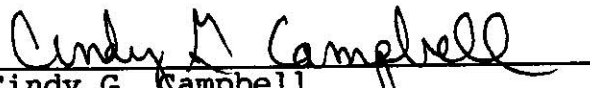
This is to certify that a true and correct copy of the foregoing Notice was duly served upon all parties of record at their address or addresses this 6th day of September, 1991, as follows:

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110 N. Frontage Road
Deer Lodge, MT 59722

Robert Hollenback
151 Village Lane
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